



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

January 29, 2014

MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

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FROM: Lisa J. Stevenson *LJS*
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SUBJECT: Interim Audit Report on the Democratic Party of Wisconsin (LRA 952)

I. INTRODUCTION

The Office of General Counsel reviewed the Interim Audit Report ("IAR") on the Democratic Party of Wisconsin ("the Committee"). The IAR contains two findings: Misstatement of Financial Activity (Finding 1); and Recordkeeping for Employees (Finding 2). Our comments address Finding 2 (Recordkeeping for Employees). We concur with any findings not specifically discussed in this memorandum. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

II. RECORDKEEPING FOR EMPLOYEES (Finding 2)

The IAR finds that the Committee did not maintain monthly logs in accordance with 11 C.F.R. §106.7 (d)(1) to document the percentage of time each employee spent on Federal election activity ("FEA").¹ For 2011 and 2012, the Committee was required to, but did not, maintain logs for payroll totaling \$3,670,266. This amount includes \$2,192,554, for which payroll was allocated with Federal and non-federal funds, and \$1,477,712, for which payroll was exclusively non-federal.

Following the exit conference, the Committee submitted a response indicating that while it had not identified any logs in its records, other information confirmed the basis upon which its employees were paid. The Committee stated that beginning in February 2011 and continuing into the summer of 2012, Wisconsin held several State recall elections, and that at least some of its employees directly involved in supporting State candidates in connection with these elections performed no work in connection with Federal elections. The Committee stated that it hired staff to work exclusively in connection with these non-federal recall elections. The Committee also submitted exhibits that included a calendar of key Federal and non-federal election dates in Wisconsin within the described period of time,² a list of employees that performed only what the party characterized as a *de minimis* amount of work in connection with Federal elections, and certain records made available during audit fieldwork containing information about employees paid exclusively with non-federal funds.³

The IAR finds that the statement and exhibits were not sufficient evidence to document the time that an employee spends on FEA. The Audit staff advised this Office that the statement and exhibits were insufficient because the documents were not created and maintained prior to issuance of the audit notification letter. In response to a question from this Office, the Audit staff further advised that affidavits from the Committee would not suffice to resolve a recordkeeping finding for the same reason. The Audit staff stated that although affidavits might help to resolve an allocation issue, no such issue arose during the course of this audit. Finally, the Audit staff noted that some of the employees whom the Committee claimed worked only on non-federal activity were paid with Federal funds. This rationale, however, and the additional information, is not discussed in the IAR. We recommend that the auditors make clear in the IAR that while the

¹ Although the audit report frames the requirement to keep a log in terms of employee time spent on FEA, we note that the regulation requires that a log be kept showing the percentage of time each employee spends "in connection with a Federal election." See 11 C.F.R. § 106.7(d)(1). We would recommend that the IAR be revised to reflect the regulation's terminology. "FEA" refers only to the four specific types of activities described in 2 U.S.C. § 431(20) and 11 C.F.R. § 100.24(b), but activity "in connection with a Federal election" is a broader term encompassing all Federal activity, not only FEA. See *Office of General Counsel Comments on Draft Final Audit Report on the Maine Republican Party* (LRA 817), p. 5.

² This exhibit also listed the names of those employees who either were hired exclusively to work on non-federal elections, or who worked on both Federal and non-federal projects.

³ This last exhibit provides the names of individuals who were paid from the Committee's non-federal bank accounts. It provides a breakdown of the individuals paid, pay period, salary amounts, taxes, fees, benefit amounts, and the non-federal bank account numbers. According to Audit staff, before receiving this exhibit, it only had information regarding whole amounts paid from the non-federal accounts.

evidence submitted by the party may be useful for allocation purposes, it is not sufficient to fulfill the recordkeeping requirement due to the timeframe in which it was prepared. *See* Final Audit Report of the Commission on the Georgia Federal Elections Committee ("FAR – GFEC") (Aug. 9, 2011). (Commission found that the committee had not maintained adequate documentation detailing time spent on Federal activities for employees despite the committee's submission of declarations from its employees attesting to the amount of time spent on Federal activities in connection with a Federal election).

The Committee's assertion that at least some of its employees worked exclusively on non-federal matters and were paid exclusively with non-federal funds, raises a legal issue as to whether the requirement in 11 C.F.R. § 106.7(d)(1) that a State or local party committee keep a monthly log "of the percentage of time each employee spends in connection with a Federal election" applies to employees who work exclusively on non-federal matters and are paid solely out of non-federal funds. We believe that it does.

The scope of the regulatory requirement of section 106.7(d)(1) is broad. It requires committees to maintain logs of the percentage of time spent in connection with Federal elections of "each employee". 11 C.F.R. § 106.7(d)(1). "Each employee" would necessarily include all the committee's employees, including those who spend no time in connection with Federal elections, because zero percent is also a percentage of time spent in connection with Federal elections.⁴ This reasoning parallels reasoning the Commission recently adopted when considering whether committees must maintain monthly logs for employees spending 100 percent of their time in connection with Federal elections. *See OGC Memorandum on Request for Early Consideration of a Legal Question in LRA 917 (Vermont Democratic Party)* ("OGC Vermont Memorandum"), at 2; *OGC Memorandum on Request for Early Consideration of a Legal Question in LRA 921 (Democratic Party of Illinois)* ("OGC Illinois Memorandum"), at 2. In these memoranda we concluded that read literally section 106.7(d)(1) requires committees to maintain monthly logs for employees paid with 100 percent Federal funds. *OGC Vermont Memorandum*, at 2; *OGC Illinois Memorandum*, at 2. We noted that "[a]lthough 100 % of the time spent on federal activity represents the whole or complete time spent on federal activity, this is still a percentage and

⁴ A committee could argue that it is not required to keep a log of the percentage of time an employee spends on Federal activity if the employee spends no time on Federal activity, relying on a Commission statement that the purpose of the log is "only [to] serve to distinguish covered employees from those over the 25% threshold," *Explanation and Justification for Final Rules on State, District, and Local Party Committee Payment of Certain Salaries and Wages*, 70 Fed. Reg. 75379, 75382 (Dec. 20, 2005) ("2005 E&J") (discussing purpose of logs when rejecting use of logs as basis for directly proportional allocation of employee salaries between Federal and non-federal funds). A "covered employee" is one who spends more than zero but less than 25 percent of the time on Federal activity. *Id.*, at 75379. However, the Commission discussed this purpose in the context of considering how to allocate employee salaries, evaluating, and ultimately rejecting as too burdensome on committees, a directly proportional allocation method. As the Commission said in the sentence following that which describes the purpose of the log, "[t]his division [between 'covered employees' and those over the 25% threshold] has legal consequences, while the particular percentage does not." *Id.*, at 75382. There are legal consequences when an employee spends zero percent of his or her time on Federal election activities: salaries for employees who spend none of their time on Federal-related activities in a given month may be paid entirely with non-federal funds. 11 C.F.R. § 106.7(d)(1)(iii). Section 106.7(d)(1)(iii) was added by this rulemaking, and did not exist prior to this Explanation and Justification. *See* 2005 E&J, at 75382. Further, as noted, the language of section 106.7(d)(1) refers to "each employee" and not merely to covered employees.

therefore must be documented.” *OGC Vermont Memorandum*, at 2; *OGC Illinois Memorandum*, at 2.

In our memoranda on the Requests for Early Consideration of a Legal Question, we observed that while the regulation literally required monthly logs for employees paid with 100 percent Federal funds, there was also a separate, prudential question of whether the Commission wished to pursue recordkeeping findings in such cases where the soft money concerns underlying the allocation regulations were absent. *Id.* The Commission ultimately decided, as a matter of discretion in the audit context, not to pursue a recordkeeping finding where the Committees failed to keep logs with respect to their employees who were paid solely out of Federal funds. See *Commission Certifications in the Matter of Request for Consideration of a Legal Question, LRA 917 (Vermont Democratic Party) and LRA 921 (Democratic Party of Illinois)*.⁵ Here, in contrast, where payment of employees solely out of non-federal funds is concerned, the soft money concerns underlying the regulations are arguably more salient. Maintaining a log for all staff, including those who did not spend time on Federal activity, is necessary to ensure that auditors can verify that those employees did not spend any time on Federal activity. As a practical matter, we have no way of knowing whether any employees spent none of their time on Federal-related activities unless we can review documentation such as a log that indicates that information.

Although we conclude for the above reasons that the recordkeeping requirement in 11 C.F.R. § 106.7(d)(1) applies to 100 percent non-federal employees, we note that the Commission considered, but did not resolve, this issue in the Georgia Federal Elections Committee audit. In that audit, the Commission split 3-3 on whether the monthly log requirement applied to employees whom the committee asserted spent no time on activity in connection with federal elections. The proponents of the failed motion asserted that “the Commission does not have jurisdiction to impose recordkeeping and documentation requirements on employee activity that a State party committee claims is solely non-federal.”⁶ See Commission Agenda Document No. 11-10-B (Motion on Audit Division Recommendation Memorandum on GFEC, *considered in Open Session*, Mar. 3, 2011). Therefore, because the Commission has not resolved, and appears to be divided over, the issue, we recommend that Audit raise the issue in the cover memorandum to the Commission that will accompany this audit report.

⁵ Specifically, the Commission ultimately voted 5-1 to conclude that section 106.7(d)(1) requires committees to maintain monthly logs for employees paid with 100 percent Federal funds, and also voted to exercise its prosecutorial discretion to not pursue a recordkeeping finding in such cases. *Commission Certifications in the Matter of Request for Consideration of a Legal Question, LRA 917 (Vermont Democratic Party) and LRA 921 (Democratic Party of Illinois)*.

⁶ More recently, during the Commission’s open meeting of January 16, 2014, the Commission held over to a future meeting its consideration of two Audit Division Recommendation Memoranda (ADRM), those on the Dallas County Republican Party (A11-14) and the Republican Party of Iowa (A11-24), for additional factual clarification relating to this issue. The Commission’s discussion of these ADRMs, a recording of which can be accessed at <http://www.fec.gov/agenda/2014/agenda20140116.shtml>, reveals continued disagreement among the Commissioners regarding whether the Commission has jurisdiction to require a State committee to maintain a monthly log with respect to those of its employees who are paid solely out of non-federal funds where the committee has made an uncontroverted representation that those employees engaged exclusively in non-federal activity.